of Malaysia as to the necessity for and the desirability of corroboration, and as to what constitutes corroboration. No such argument was submitted to the courts below, whose views upon the matter would be indispensable to the Board. In the circumstances this fresh argument was not heard.

Their Lordships have reported to the Head of Malaysia their opinion that the appeal should be allowed and the appellant's conviction quashed.

Appeal allowed.

Solicitors: *Graham Page & Co.*; *Wray Smith & Co.*

H.G. WARREN v. TAY SAY GEOK & ORS.

[P.C. (Lord Reid, Lord Hodson and Sir Benjamin Ormerod) October 5, 1964]

[Privy Council Appeal No. 30 of 1963]

Contract — Sale of land — Repudiation of contract by purchaser — Forfeiture of deposit.

Vendor and purchaser — Deposit — Time not of the essence of contract — Failure to complete — Whether deposit recoverable.

Civil Law Ordinance, 1956, s. 3 — Application of common law of England and rules of equity.

In this case the appellant had entered into an agreement with the respondents for the purchase of land and it was agreed *inter alia* that the appellant should pay $90,000 approximately 10% of the purchase price by way of deposit and in part payment and that the balance of the purchase price should be paid on or before 7th August, 1960. The appellant paid the deposit but failed to pay the balance of the purchase price on the 7th August, 1960. There were some negotiations for a modification of the agreement but they were not successful. The appellant claimed the return of the deposit and the trial judge gave judgment in his favour. This decision was reversed by the Court of Appeal ([1963] M.L.J. 179) and the appellants thereupon appealed to the Privy Council.

Held: as on the facts the purchaser had repudiated the contract the vendor was entitled to accept the repudiation and claim the forfeit of the deposit.

Cases referred to:—

(1) *Stickney* v. *Keeble* [1915] A.C. 386 at p. 415.

(2) *Howe* v. *Smith* (1884) 27 Ch.D. 89 at p. 95.

PRIVY COUNCIL.

Dingle Foot Q.C. and *M. P. Solomon* for the appellant.

W. H. Sault and *P. R. Oliver* for the respondents.

The judgment of the Lords of the Judicial Committee of the Privy Council was delivered by,

Lord Hodson: This is an appeal from a judgment of the Court of Appeal at Kuala Lumpur dated the 28th February 1963 allowing an appeal by the respondents from a judgment of the High Court of Kuala Lumpur whereby the appellant obtained an order for the return of $90,000 paid by him as a deposit and in part payment of the purchase price under an agreement for the sale of land.

The agreement was dated the 31st May 1960 and provided, *inter alia*, that the appellant should pay $90,000, approximately 10 per cent. of the purchase price, by way of deposit and in part payment, that the balance of the purchase price should be paid on or before the 7th August 1960, that the appellant should enter into possession from the date of execution of the agreement and maintain the estate and buildings etc. and that if the appellant should fail to complete the purchase according to the agreement the deposit was to be considered as liquidated damages and should be forfeited to the vendors.

The appellant paid the deposit but failed to pay the balance of the purchase price on the 7th August 1960 or at all. He has never entered into possession of the land.

On the following day a meeting took place at the appellant's house at which the appellant himself, a representative of the respondents and others were present. At this meeting it was agreed in principle that two months extension of time for completion would be granted subject to the appellant agreeing to make additional payments by way of interest on the balance of the purchase price and further deposit. The additional payments totalled $35,500. These conditions were embodied in a letter dated the 10th August 1960 from the appellant's solicitors. At this meeting there was also discussed what is referred to as an "instalment sales agreement" which would enable the purchaser to sell off the smaller pieces of land comprised in the whole before paying the balance. This would go a long way towards making up the total purchase price. The letter of the 10th August contained no reference to this discussion. It is a letter asking for time and offering to pay for it but not seeking to introduce a new arrangement enabling the appellant to dispose of the small acreages to get finance to complete the transaction. The respondents' solicitors replied accepting the proposals contained in the letter of the 10th August, subject to certain reservations, and added that time should be expressed to be of the essence of the contract and that the acceptance date should be deemed to have been the 8th August 1960. They asked for a draft supplemental agreement on these lines to be submitted.

On the 17th August the appellant's solicitors wrote enclosing a draft supplemental agreement which included a proposed paragraph 4 covering the instalment sales arrangement which was said to have been agreed in principle with the representatives of the respondents.

That clause reads as follows:—

"4. Prior to the date hereinafter fixed for the completion of the purchase the vendors will at the request of the purchaser execute and deliver to the purchaser his nominee or nominees a proper conveyance or conveyances and assignment of all or any of the said lands more particularly described in the First Schedule to the principal agreement upon payment to the vendors of the *pro rata* purchase price of $1,800 per acre or such increased price as the purchaser shall have arranged to sell any such part or parts of the said land to a sub-purchaser and any such excess price shall be retained by the vendors to account of the balance payable on completion but shall not be considered as further deposit".

The respondents' solicitors replied by telegram, afterwards confirmed by letter, saying that paragraph 4 was unacceptable and had never been agreed to by their client and that the deposit would be forfeited unless $35,500 was paid the following day.

Further correspondence took place between the solicitors in which the appellant's advisers maintained that the respondents had no right to rescind the contract of which time was not the essence or to cause the appellant to forfeit his deposit. The respondents' solicitors for their part maintained that the deposit was forfeited.

On the 22nd November 1960 the appellant instituted proceedings for the return of the deposit.

The trial judge held that time was not of the essence of the contract to which the respondents had put an end, that there had been no unreasonable delay on the part of the appellant and that if he had asked for specific performance of the contract he would undoubtedly have had a good case.

He accordingly gave judgment in favour of the appellant for the return of the deposit.

The case was argued in the Court of Appeal on the assumption that the equitable rule that in contracts for the sale of land provisions as to the time of performance are not to be strictly construed unless time is expressly made of the essence of the contract.

In England the rule is now contained in section 41 of the Law of Property Act 1925 and reads as follows: "Stipulations in a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules."

By section 3 of the Civil Law Ordinance 1956 the Courts of Malaya apply the common law of England and the rules of equity as there administered save in so far as other provision is made by any written law in force in the Federation.

There is a proviso that such law and rules shall be applied so far only as the circumstances of the States comprised in the Federation and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

There is no evidence that this proviso prevents the application of the English rules to this case and their Lordships will proceed on the same assumption as the Court of Appeal. They also accept the view of the trial judge implicitly accepted by the Court of Appeal that time was not of the essence of the contract and has never been made so by notice or otherwise. The question remains whether on the facts of the case the appellant is entitled to the return of his deposit.

The equitable rule was explained by Lord Parker of Waddington in *Stickney* v. *Keeble*[1] in these words:—

"In such cases, however, equity having a concurrent jurisdiction did not look upon the stipulation as to time in precisely the same light. Where it could do so without injustice to the contracting parties it decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion and as an incident of specific performance relieved the party in default by restraining proceedings at law based on such failure. This is really all that is meant by and involved in the maxim that in equity the time fixed for completion is not of the essence of the contract."

This is not an action by the appellant for specific performance. It is an action for return of a deposit which is a common law claim and is *prima facie* defeated by clause 8 of the agreement which provided that if the obligation to pay the balance of the purchase money by the 7th August 1960 was not fulfilled the deposit was forfeited.

The obligation was not fulfilled on the 7th August or at any other time. The facts recounted show that the appellant was not ready and willing to perform the contract but desired such a substantial modification of it as to amount to a new contract including as it did a provision permitting him to sell some of the land subject to the contract and so acquire money towards payment of the balance of the purchase price. Their Lordships agree with the Court of Appeal that this new contract was different from the agreement of May 31st 1960 particularly in that $800,000 was proposed to be paid by instalments in the way suggested rather than in one lump sum as originally agreed.

There is no equity which in such circumstances would give the appellant a good case for specific performance and it is hard to see why he should not be bound by the terms of his contract to forfeit his deposit.

The law is clear and it was not disputed by counsel for the appellant that a deposit is forfeited if the purchaser repudiates the contract.

In such a case the vendor can accept the repudiation and claim the forfeit of the deposit.

The matter is clearly stated by Cotton L.J. in the leading case of *Howe* v. *Smith* [2] as follows:—

"The deposit, as I understand it, and using the words of Lord James (viz. in *Ex parte Barrell* L.R. 10 Ch. 512), is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then, according to Lord Justice James, he can have no right to recover the deposit".

Cotton L.J. went on to say that he was not saying that in all cases where the courts would refuse specific performance the vendor ought to be entitled to retain the deposit. He made plain that, in order to enable the vendor so to act, in his opinion there must be acts on the part of the purchaser which would make his conduct amount to a repudiation on his part of the contract.

The appellant has sought to argue that there has been no express repudiation on his part or conduct which amounts to repudiation in the sense in which the word is used by Cotton L.J.

Their Lordships cannot accept his contention. The appellant has throughout insisted that he was not prepared to go on with the contract unless he obtained an alteration which would make a substantial variation in the obligations imposed upon him.

The correspondence between the solicitors to which reference has been made makes this clear. The appellant when he failed to get his way made no effort to fulfil the contract in its original form. He was acting as an agent and the evidence of his principal, a Mr. Segram Jeyaraja, was that he had every intention of carrying on with the contract if he was given the extension of time and paragraph 4 of the supplemental agreement. He also said that clause 4 was not accepted by the vendors and that was the reason why he did not continue with it. The appellant was saying he could not go on unless he obtained additional finance in the way suggested by him. This may be called a conditional repudiation but the vendor was entitled to take the purchaser at his word and treat the contract as at an end. It was made plain at the interview of the 8th August that finance was the stumbling block. The proposed sub sales were discussed and heads of agreement to get more time were settled. The belated injection of clause 4 into the letter of the 17th August when its subject had not been included in the letter of the 10th August makes it incredible that clause 4 had been agreed in principle at the interview of the 8th August. The course of conduct between the parties shown by the correspondence and by the oral evidence leads to the inference that the appellant had, in the sense in which the word is used in the authorities, repudiated the contract. It cannot therefore be said that it is unconscionable for the respondents to insist on their legal rights to make the appellant forfeit the deposit which remains in their hands.

Their Lordships will accordingly report to the Head of Malaysia their opinion that the appeal should be dismissed and the costs of the respondents of this appeal paid by the appellant.

Appeal dismissed.

Solicitors: *Graham Page & Co.*; *Coward Chance & Co.*

YUNUS v. ANNUAR & ANOR.

[F.C. (Barakbah Ag. L.P., Ismail Khan and Azmi JJ.) October 5, 1964]

[Kota Bharu — Federal Court Civil Appeal No. 30 of 1963]

Negligence — Liability of owner of vehicle — Passenger taken on lorry contrary to orders of owner — Passenger driving vehicle in spite of protest by driver — Whether trespasser.

This was an appeal by the appellant the owner of a vehicle against a judgment which awarded damages against him in favour of the first respondent. The respondent had been injured as a result of a collision between a lorry driven by his driver and a lorry belonging to the appellant, which was at the time of the accident driven by the second respondent. The regular driver of the appellant's lorry had agreed to give the second respondent a lift and the second respondent had then driven the lorry in spite of the repeated protests of the regular driver. It was found that the accident was caused by the negligence of the second respondent in driving the lorry.

Held: as the driver had taken the second respondent as a passenger in disobedience of the employer's orders, the second respondent was a trespasser and not a servant of the appellant and the appellant was not liable for acts done by him.

[**Editorial Note:** See also *Chuan Seng & Co. Pineapples Factory* v. *Idris & Anor.* [1962] M.L.J. 239 where the Court of Appeal held that the owner of a vehicle was not liable in damages to the estate of a trespassing passenger.]

Cases referred to:—

(1) *Wright* v. *International Tea Co.* (unreported).

(2) *Twine* v. *Bean's Express Ltd.* [1946] 1 All E.R. 202.

(3) *Conway* v. *George Wimpey & Co. Ltd.* [1951] 1 All E.R 363.

FEDERAL COURT.

N. Sharma for the appellant.

Abdul Aziz for the 1st respondent.

Barakbah Ag. L.P.: This appeal by the appellant (2nd defendant) against the judgment of Hashim J. in awarding damages to the respondent (plaintiff) in the sum of $1,460 for loss